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August 24, 1992

ORIGINAL
FILE

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 91-221

Dear Ms. Searcy

Transmitted herewith on behalf of McKinnon Broadcasting Company, licensee of television station KUSI-TV, San Diego, California, are an original and nine copies of its Comments and Counterproposal in the above referenced rule making proceeding.

Enough copies are being submitted for distribution to each Commissioner.

Very truly yours

Stanley S. Neustadt

Stanley S. Neustadt

Enclosures

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AUG 2 4 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

FCC 92-209
38398

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)))	MM Docket No. 91-221

COMMENTS AND COUNTERPROPOSAL OF MCKINNON BROADCASTING COMPANY

McKinnon Broadcasting Company (McKinnon), by its attorneys, respectfully submits these Comments and Counterproposal in response to the Notice of Proposed Rulemaking (NPRM) released in the above captioned proceeding on June 12, 1992. These Comments deal exclusively with the Commission's proposal (¶¶ 38-41) to consider amendment or elimination of Section 73.658 (l) of its Rules. McKinnon respectfully urges that the present Section 73.658(l) be retained. It urges, in addition, that the Rule should be amended to deal not only with multiple network programming by a single station in a market when other independent stations are available, but with the situation in which network programming is made available to a foreign station when there are domestic U.S. stations which can provide comparable service to the market. The same reasons which underlie the existing Section 73.658(l), and which recent events have made even more compelling, require the rule amendment which McKinnon here proposes. The McKinnon counterproposal could be effectuated either by the enactment of a new subsection (n) to Section 73.658 as follows:

> "(n) <u>Affiliation with Foreign Stations</u>. No television network shall affiliate with any foreign station which serves a United States market unless the following conditions are met:
>
> 1. There is no operating unaffiliated domestic station with comparable facilities for service to the United States market, or the network has offered a regular affiliation to such a domestic station and that offer has been rejected; or
>
> 2. The network has filed with the Commission an application on FCC Form 308 for authority to transmit its programs to said foreign station, regardless of the method employed for such transmission, and such application has been granted by the Commission. (Note: The definitions of the operative terms in this sub-section shall be those set forth in sub-section 9(1) of this section except to the extent that "reasonably comparable facilities" is modified as set forth above.)

or by incorporating the substance of this proposal into Section 72.658(l). In support of its position McKinnon states:

1. The Commission explained in the NPRM that Section 73.658(l) was adopted to prevent network bias against primary affiliations with independent stations, particularly in the UHF, and thereby to guarantee UHF stations access to more desireable network programs on a regular and continuing basis, enabling the UHF to become viable and more competitive (NPRM, ¶¶ 39-40). The Commission now questions whether changes in the marketplace, with a great increase in the supply of programming, remove any justification for continuance of the Rule. It acknowledges in the NPRM that network programming may still be so commercially valuable

that the Rule should be retained in order to enhance the ability of independent stations to compete (NPRM, ¶ 41).

2. McKinnon has urged the Commission, in a Petition for Rule Making which is discussed below, that the programming marketplace and the competitive position of independent stations, particularly in the UHF, are such that the Commission should insure by Rule that network programming not be provided to foreign competitors. The same reasoning requires the retention of Section 73.658(l). However, whatever the justification for the retention of Section 73.658(l) prior to May 8, 1992, on that day the Commission announced a policy concerning Advanced Television (ATV) which changes for the foreseeable future the need for governmental action to require, insofar as possible, that network programming be made available to as many independent stations as possible. This new element in the equation will otherwise result in a much greater disparity between independent stations and network affiliates than the VHF-UHF disparity which gave rise to the Rule in 1971.

3. The <u>Second Report and Order</u> in <u>Advanced Television Systems</u>, 7 FCC Rcd. 3340 (1992) discusses at some length the transition from the present NTSC system to ATV, and makes clear that there will be a rigid timetable by which all stations with ATV authorizations must commence broadcasting programming in the ATV mode (<u>Second Report</u>, ¶¶ 61-62). It provides that seven years after an ATV allotment is made, each station must simulcast at least 50% of its programming in the ATV mode. The Commission recognizes in

the <u>Second Report</u> the tremendous expense which will be involved in the acquisition of ATV transmitting equipment and ATV program origination equipment. It has made clear, therefore, that the ATV programming requirement can be fulfilled by rebroadcasting programs in the ATV mode which are received from the networks. In this manner network television licensees will have immediately available ATV programming and, further will be spared the extreme initial expense of ATV program origination equipment.

4. If Section 73.658(l) is not retained, it is likely that the transition to ATV will result in some independent stations having to cease operation entirely. This is because independent stations, which can less afford it, may have to purchase and install ATV program origination equipment before their more affluent network affiliate competitors. This possibility in itself justifies retention of the Rule. On the other hand, there would appear to be no justification or need for elimination of the Rule at this time. The NPRM does not suggest any harm which has resulted from the Rule during the 21 years that it has been in effect. The suggestion that this might be an appropriate time to eliminate the Rule is not based on any harmful consequences, but apparently is just a sort of housekeeping. Because it now appears highly probable that there will be greater need for the Rule in the future than existed even at the time it was originally adopted, the public interest demands that the Rule be retained.

5. There is even greater reason for adopting the McKinnon Counterproposal. Whatever conceivable justification might exist (although McKinnon is aware of none) for permitting United States television stations to broadcast the programs of more than one network at the possible expense of independent stations in the market, there can surely be no justification for permitting the broadcast of American network programming by a foreign station which serves a United States market at the expense of a domestic independent station. Although a prime example of the harmful effect of network affiliations with foreign station is found in the San Diego market in which McKinnon operates, there are numerous Mexican VHF stations along the United States-Mexican border which are finding increased audience acceptance in United States communities close to the border (e.g., El Paso, Laredo, Weslaco/Brownsville). To the extent that the audience ratings of those Mexican stations may exceed the ratings of domestic stations, United States networks may choose in the future to affiliate with them rather than domestic stations. The harmful results to United States independent stations will be grave, if not fatal.

6. Because of the unusual competitive situation in which McKinnon finds itself in San Diego, it filed, on March 6, 1991, a Petition for Rule Making which urged the adoption of a rule identical to its Counterproposal herein. By letter dated November 27, 1991 that Petition for Rule Making was denied by the Mass Media Bureau without publication of the filing of that Petition and a

total absence of any comments by interested parties. McKinnon's Application for Review of that Bureau action was filed on December 27, 1991, and is still pending before the Commission.

7. Each of the three traditional national networks has an affiliate in that market. The CBS affiliate is Station KFMB-TV, Channel 8, the ABC affiliate is Station KGTV, Channel 10, and the NBC affiliate is Station KNSD, Channel 39. Fox Broadcasting Company ("Fox") also has an affiliate which serves the San Diego market, Station XETV, licensed to Tijuana, Mexico, Channel 6.[1/] McKinnon attempted and has been unsuccessful in its attempts to acquire an affiliation with Fox, and to gain such revenue as would result, which now flows out of the United States.

8. At the present time, Station XETV is not governed by U.S. political broadcasting requirements such as "equal opportunity" and lowest unit charge; it is not subject to the important equal employment opportunity and affirmative action requirements of American law; it is not required to maintain a public file, ascertain community needs or to air responsive programming; it is not governed by the new requirements concerning children's TV programming; and it is under common control with another VHF television station at Tijuana, which would not be permitted under current FCC regulations. In other words, none of the structural or content broadcast regulations which have been adopted by the

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1/Also licensed to serve San Diego are Station KTTY, Channel 69 and Station KPBS-TV, Channel 15, a noncommercial station, in addition to Station KUSI-TV.

Commission to serve the public interest are applicable to or complied with by Station XETV,. McKinnon does, of course, comply with all of them.

9. The method by which Fox programming is transmitted to Station XETV is completely immaterial to the merits of the McKinnon Counterproposal. In fact, Fox programming is bicycled across the border to Station XETV, apparently in order that Fox may avoid filing an application with the Commission for authority to transmit its programming to Mexico by electronic means, as would be required by Section 325(b) of the Communications Act. The McKinnon Counterproposal is not grounded in Section 325(b). It is grounded on exactly the same bases as the present Section 73.658(l).

10. The Mass Media Bureau's denial of the McKinnon Petition for Rule Making was principally grounded on an unexplained ruling that there is no supportable reason for changing the Commission's approach toward network regulation, particularly in light of First Amendment concerns. The existence of a supportable reason for changing the Commission's approach toward network regulation, although it could not be discerned by the Mass Media Bureau, was unequivocally set forth by the Commission itself in American Broadcasting Companies, Inc., 35 FCC 2d 1, 24 RR 2d 471 (1972). In that case the Commission, after a full hearing, denied an application by ABC to transmit programming to Mexico for rebroadcast to the San Diego market. In terms solely of the public interest, which apply with equal force to the matters raised

herein, the Commission stated (35 FCC 2d, at 12):

> The fact that the existing third San Diego station available for network service to the local community is a UHF station serves to reinforce our conclusion that renewal of the ABC authorization is neither required by, nor warranted in the overall public interest.

11. These Comments and Counterproposal set forth an additional public interest reason for changing the Commission's approach toward network regulation in this regard. The dramatic change which results from the Commission's ATV transition policy is in itself more than adequate justification for adopting the McKinnon Counterproposal.

12. In any event, there can be no significant First Amendment question about the McKinnon Counterproposal. No First Amendment question has been raised about Section 73.658(l) during its 21 year existence or about Section 73.658(j) or Section 73.658(m), each of which involves the same limitations on speech. Moreover, as has been noted, the McKinnon Counterproposal does not raise any question whatsoever under Section 325(b) of the Communications Act. Even the Mass Media Bureau, in denying the McKinnon Petition for Rule Making, has not hinted, let alone argued, that adoption of the McKinnon Counterproposal would have any adverse effect whatsoever on the public interest. In these circumstances, therefore, the public interest requires that the McKinnon Counterproposal be adopted. It would serve the public interest legally, and protect domestic United States television during a critical period in full

compliance with Constitutional, statutory, and FCC policy requirements.

Respectfully submitted

MCKINNON BROADCASTING COMPANY

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August 24, 1992